

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OCT 17 2005

JAMES R. LARSEN, CLERK
DEPUTY
YAKIMA, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN P. O'HEARNE,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social
Security,

Defendant.

NO. CV-04-0397-MWL

**ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S CROSS-
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff, John O'Hearne, moves the court for summary judgment and Defendant has submitted a cross-motion for summary judgment. Because the court finds the Administrative Law Judge ("ALJ"), in his reasoned decision, properly analyzed Plaintiff's mental and physical impairments, complaints of symptoms and pain, and credibility, the court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion.

BACKGROUND

Plaintiff protectively filed applications for Title XVI Supplemental Security Income and disability insurance benefits on September 4, 2001, alleging disability as of April 15, 2001, based on a variety of musculoskeletal and mental impairments. (Tr. 17, 77-81, 422-425). These impairments include upper and lower back

1 injury, hepatitis C, cirrhosis, hemochromatosis, and depression.
2 (Tr. 18, 93). Plaintiff was notified that his application for
3 benefits had been denied initially and upon reconsideration. (Tr.
4 17, 34, 40, 427, 429). A hearing was requested and subsequently
5 conducted on March 3, 2003, which hearing was continued on May 28,
6 2003. (Tr. 43, 17, 434-490).

7 At the first hearing, testimony was taken from Plaintiff, who
8 was represented by an attorney, and a medical expert, Ronald M.
9 Klein, Ph.D. At the second hearing, testimony was taken from
10 Plaintiff, who again was represented by an attorney, and a
11 vocational expert, K. Diane Kramer. On July 22, 2003, the ALJ
12 issued a nine-page decision denying Plaintiff's applications, based
13 only on consideration of Plaintiff's severe impairments other than
14 substance abuse. (Tr. 17-25).

15 On September 7, 2004, the Appeals Council denied Plaintiff's
16 request for review, making the ALJ's decision the final decision of
17 the Commissioner.¹ (Tr. 6-9). The Plaintiff then commenced this
18 action on October 29, 2004, which is before the Magistrate Judge for
19 review pursuant to consents filed on November 29, 2004. See 28
20 U.S.C. §636(c); Fed.R.Civ.Pro. 73.

21 **FACTS**

22 The facts have been presented in the administrative transcript,
23 the ALJ's decision, and the briefs of both Plaintiff and Defendant.
24 This court will adopt those facts and provide a brief summary.
25 Plaintiff was 49 years old at the time of the ALJ's final decision
26 and considered a "younger individual between the ages of 45 and 49"
27 pursuant to 20 C.F.R. §404.1563 and 416.963. (Tr. 24). He completed
28

¹See 20 C.F.R. §§404.981, 416.1481, 422.210.

1 high school, and attended two years of college classes in surveying
2 and mapping and civil engineering technology. (Tr. 444). His past
3 work experience included employment as a land surveyor, fish
4 processor, boring machine operator and heavy truck driver. (Tr.
5 18). He currently is an assistant manager at his place of
6 residence, a community transitional housing for veterans. (Tr. 21,
7 457). Plaintiff has a long history of alcohol abuse and has lost
8 jobs and his driver's license(s) because of his drinking. (Tr. 21,
9 243, 442, 448). He testified at the hearing that the last time he
10 worked was about April of 2001, as a truck driver but the job ended
11 with his license suspension for drinking while on the job. (Tr.
12 447-448).

13 At the March 2003 hearing, the ALJ asked Plaintiff questions
14 regarding his drug, tobacco, and alcohol habits. He testified that
15 he smokes and is on nicotine patches. (Tr. 458). He testified that
16 he does not drink any longer and the last drink he had was May 1,
17 2001. Id. He stated that he used illegal or recreational drugs in
18 the past but stopped about four years ago. (Tr. 459). Plaintiff
19 testified that he can take care of his own personal needs,
20 apartment, cooking, washing, and finances (Tr. 454, 455, 459).

21 ALJ'S FINDINGS

22 The ALJ applied the five-step sequential process for
23 determining whether a claimant is disabled. See 20 C.F.R.
24 §§404.1520, 416.920. The ALJ found at step one that Plaintiff had
25 not engaged in substantial gainful activity since his alleged
26 disability onset date. (Tr. 24, Finding 2). The Plaintiff does not
27 dispute this finding.

28 At step two, the ALJ found that Plaintiff had the following

1 severe impairments: chronic obstructive pulmonary disease [COPD],
2 hepatitis C, cirrhosis of the liver, dysthymia, an affective
3 disorder, and alcohol abuse (in self-reported remission). (Tr. 20,
4 24, Finding 3). Plaintiff does not dispute this finding.

5 At step three, the ALJ found that Plaintiff's impairments did
6 not meet or equal the requirements of a listed impairment. (Tr. 24,
7 Finding 4). Plaintiff does not appear to dispute this finding.

8 The ALJ determined that Plaintiff had the residual functional
9 capacity [RFC] to perform light work. (Tr. 24, Finding 7). The ALJ
10 found that Plaintiff's allegations regarding his limitations were
11 not considered to be totally credible (Tr. 24, Finding 5), which
12 finding the Plaintiff disputes. The ALJ also found that Plaintiff
13 should work relatively alone with just superficial interactions with
14 co-workers and the general public. (Tr. 21). This finding is not
15 in dispute.

16 At step four, the ALJ found that Plaintiff was unable to
17 perform his past relevant work. (Tr. 24, Finding 8). This finding
18 is not in dispute.

19 At step five, the ALJ found that, based on the above residual
20 functional capacity, Plaintiff had transferable skills from skilled
21 work previously performed and could perform work existing in
22 significant numbers in the national economy, specifically noting the
23 jobs testified to by the vocational expert. These jobs included
24 field map editor, geodetic compiler, and commercial
25 cleaner/janitor. (Tr. 22, 24, Findings 11, 13). This finding is in
26 dispute.

27 DISCUSSION

28 Plaintiff argues that the ALJ improperly rejected Plaintiff's

1 symptom and pain testimony because he did not make specific findings
2 stating clear and convincing reasons as to why such testimony was
3 rejected. Ct. Rec. 13, at 13. Plaintiff urges that the ALJ's
4 decision should be reversed. Id.

5 **A. Review of Commissioner's Decision**

6 A district court must uphold the [Commissioner's] determination
7 if the factual findings are supported by substantial evidence and
8 the [Commissioner] applied the proper legal standards. *Curry v.*
9 *Sullivan*, 925 F.2d 1127, 1129 (9th Cir.1990). "Substantial evidence"
10 is more than a "mere scintilla" of evidence, but "less than a
11 preponderance." *Young v. Sullivan*, 911 F.2d 180, 183 (9th Cir.1990)
12 *Connett v Barnhart*, 340 F.3d 871.873 (Ninth Cir. 2003). If the ALJ
13 applies the wrong legal standard, the ALJ's decision must be set
14 aside even though the findings are supported by substantial
15 evidence. *Browner v. Secretary of Health and Human Services*, 839
16 F.2d 432, 433 (9th Cir. 1987).

17 The district court must uphold the Commissioner's denial of
18 benefits if the evidence is susceptible to more than one rational
19 interpretation, one of which supports the decision of the
20 administrative law judge. See *Burch v. Barnhart*, 400 F.3d 676, 679
21 (9th Cir.2005); *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.2002).

22
23 **B. The ALJ Properly Concluded That Plaintiff Could Perform
24 Light Work In The Absence of Alcohol Abuse**

25 **1. Credibility Determination With Respect To Disabling
26 Pain and Severity of Symptoms**

27 Plaintiff argues that the ALJ failed to reject his symptom
28 testimony with specific findings, stating clear and convincing
reasons. Ct. Rec. 13, at 12. The court disagrees.

1 The ALJ properly discredited, to the extent appropriate,
2 Plaintiff's allegations of disabling pain and disabling mental and
3 physical impairments, symptoms, and limitations. The ALJ's decision
4 contained an evaluation of Plaintiff's credibility in the body of
5 the decision. (Tr. 19-21). The ALJ expressly provided the
6 following specific and legitimate reasons to find Plaintiff less
7 than fully credible:

- 8 1. The ALJ noted that "[t]he claimant's report of inability
9 to work is inconsistent with duties as assistant manager
at his place of residence." (Tr. 21, 170).
- 10 2. The ALJ noted that Plaintiff "can perform his activities
11 of daily living, does chores and has even assumed the role
of assistant manager at his place of business." (Tr. 21).
- 12 3. The ALJ noted that Plaintiff "lost his job because of
13 drinking and not because of psychological problems."
(Tr. 21, 93, 442).
- 14 4. Plaintiff lost his commercial driver's license because he
15 had alcohol on his breath while driving a long haul truck
on the job (Tr. 21, 203, 442, 447-48), "not because he was
16 suffering dizzy spells." (Tr. 21, 455).
- 17 5. The ALJ noted further inconsistencies between Plaintiff's
self-reports that it has currently been about two years
18 since he last drank and the VA record notation (dated
March 2003) that his last drink was "over 2 months ago".
19 (Tr. 21, 406).
- 20 6. The ALJ noted that, "The claimant's substance abuse
remission is self-reported and questionable." (Tr. 21).
- 21 7. The ALJ noted that: "Tests show that the claimant's liver
22 is only mildly enlarged with no varicies [sic] and no
jaundice, he is not on a transplant list or receiving
23 Interferon and he takes Ibuprofen for generalized joint
pain. The COPD is only treated when there are acute
24 flare-ups. The condition is moderate rather than severe."
(Tr. 21, 170).
- 25 8. The ALJ also noted that Plaintiff continues to smoke
26 cigarettes (Tr. 21) despite numerous warnings by medical
personnel.

27 Because the ALJ set forth specific, legitimate reasons for
28 giving less weight to Plaintiff's testimony and based on an

1 independent review of the entire administrative record², the
 2 undersigned finds substantial evidence supporting the determination
 3 that Plaintiff did not suffer from severe mental or physical
 4 impairments to the extent alleged. Under *Batson v. Commissioner of*
 5 *Social Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir.2004), the ALJ's
 6 credibility finding must be affirmed.

7 **2. The ALJ Made a Proper RFC Determination According**
 8 **Proper Weight to Medical Opinions**

9 Plaintiff argues that he does not believe that there was
 10 substantial evidence to support the ALJ's decision with regard to
 11 his determination that he was capable of doing light work. Ct. Rec.
 12 13, at 10. Plaintiff's arguments are not convincing and lack
 13 citation to evidence in the record to refute the ALJ's decision.

14 The ALJ adopted the Disability Determination Services [DDS]
 15 physician's opinion that Plaintiff was capable of performing light
 16 work. (Tr. 19, 166-70, 354-60). The ALJ also noted that the DDS
 17 psychologist opined that Plaintiff should work relatively alone with
 18 just superficial interactions with co-workers and the general
 19 public. In this regard, the ALJ stated in his decision that Dr.
 20 Edward Beaty, a licensed psychologist and DDS medical consultant,

21 ²The undersigned independently finds further evidence to
 22 buttress the ALJ's credibility determination. Chart notes from
 23 the Veteran's Administration [VA] indicate that Plaintiff's
 24 "duties include interviewing and orienting new residents." (Tr.
 25 215). In June 2002, chart notes indicated, "Not a candidate for
 26 PEG interferon-ribavirin due to normal ALTs and severe
 27 depression." (Tr. 380; emphasis added). VA chart notes on
 28 September 6, 2001 indicate that Plaintiff "last worked 4-01 doing
 maintenance work. He stopped working because he started
 drinking." (Tr. 243). VA chart notes on September 10, 2001
 indicate that "Vet appears to be remaining abstinent and making
 good progress as evidenced by his use of several resources to
 assist his recovery." (Tr. 238). VA chart notes on July 6, 2001
 indicate that Plaintiff reported his last drink was "over 2
 months ago." (Tr. 280). VA notes on May 23, 2001 indicate
 Plaintiff's last drink was 23 days earlier. (Tr. 314).

1 assessed Plaintiff as,

2 moderately limited only in his ability to work
3 in coordination with or proximity to others
4 without being distracted by them and in his
5 ability to interact with the general
6 public...had no restriction of activities of
7 daily living, moderate difficulties in
8 maintaining social functioning, mild
9 difficulties in maintaining concentration,
10 persistence or pace and has had one episode of
11 decompensation

12 (Tr. 19-20, 186-88, 375-78).

13 The ALJ noted Dr. Ronald Klein, Ph.D.'s testimony that nothing
14 in the medical documents of record establishes that the Plaintiff
15 has an impairment so severe that he could not work. To that effect,
16 Dr. Klein, a psychologist and medical expert testified at the
17 hearing as follows:

18 There's no doubt that Mr. O'Hearne has
19 significant psychiatric difficulties along with
20 certain medical problems, but in terms of
21 actual impairment from participating in
22 substantial gainful activity at some level, I
23 don't-I don't see him there. I see problems
24 that are appropriately treated, and he should
25 certainly continue with outpatient treatment as
26 he has been and would certainly benefit, I
27 think, overall in striving towards improved
28 mental health by having regular scheduled self-
supportive activity to participate in.

(Tr. 441).

22 Although the court is not to reweigh the evidence, the findings
23 of the Commissioner will not be mechanically accepted. Nor will the
24 findings be affirmed by isolating facts and labeling them
25 substantial evidence, as the court must scrutinize the entire record
26 in determining whether the Commissioner's conclusions are rational.
27 *Graham v. Sullivan*, 794 F.Supp.1045, 1047 (D.Kan.1992). The court
28 examines the record as a whole, including whatever in the record

1 fairly detracts from the weight of the Commissioner's decision and,
 2 on that basis, determines if the decision is supported by
 3 substantial evidence in the record. *Glenn v. Shalala*, 21 F.3d 983,
 4 984 (10th Cir.1994). The undersigned concludes that the ALJ's
 5 conclusions are rational and the decision is supported by
 6 substantial evidence.

7 Specifically, the ALJ properly evaluated the psychopathology
 8 professional opinions of record³, which opinions appeared to be
 9 consistent with the ALJ's determination that Plaintiff could perform
 10 a significant range of light work with specific work restrictions.

11 3. Substance Abuse

12 The Social Security Act ("Act") defines disability as the
 13 "inability to engage in any substantial gainful activity by reason
 14 of a medically determinable physical or mental impairment which can
 15 be expected to last for a continuous period of not less than 12
 16 months." 42 U.S.C. §§ 423(d)(1)(A). In 1996, Congress amended the
 17 Act to preclude entitlement to disability benefits based on drug
 18 addiction or alcoholism. Pub.L. 104-121, enacted March 29, 1996,
 19 precludes an award of SSI under Title XVI of the Act, "if alcoholism
 20 or drug addiction would (but for this subparagraph) be a
 21 contributing factor material to the Commissioner's determination
 22 that the individual is disabled." Pub.L. 104-121, §§ 105(a), 105(b).

23
 24 ³"State agency medical and psychological consultants are
 25 highly qualified physicians and psychologists who are experts in
 26 the evaluation of the medical issues in disability claims under
 27 the Act." SSR 96-6p, available at 1996 WL 374180, at *2.
 28 Administrative law judges and the Appeals Council may not ignore
 these opinions and must explain the weight given to the opinions
 in their decisions. *Id.* The ALJ concluded that "the opinions of
 the non-examining State Agency consultants tend to support the
 undersigned's conclusion as does additional evidence received
 subsequent to their opinions, including testimony at the hearing."
 (Tr. 20).

1 Drug addiction or alcoholism is material to a finding of disability
2 if the individual would not be found disabled if he stopped using
3 drugs or alcohol. 20 C.F.R. §§ 404.1535(b), 416.935(b).

4 The ALJ considered all the evidence of record, and determined
5 that Plaintiff was not disabled based only on consideration of
6 Plaintiff's severe impairments other than substance abuse.
7 Testimony from the medical expert, Dr. Klein, indicated that
8 Plaintiff would be plagued with an inability to function in a work
9 setting with alcohol abuse. (Tr. 441-42). It is inherent in the
10 decision that Plaintiff's substance abuse, in self-reported
11 remission, is a material factor contributing to any finding of
12 disability.

13 CONCLUSION

14 According to the law, and the substantial evidence of record,
15 the court is required to uphold the ALJ's decision. Accordingly,

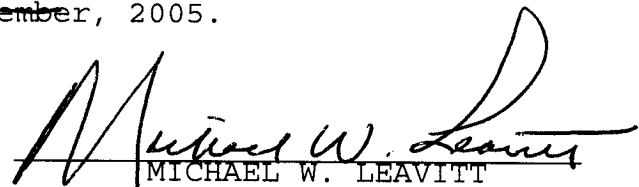
16 IT IS HEREBY ORDERED:

17 1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 12) is
18 DENIED.

19 2. Defendant's Cross-Motion for Summary Judgment (Ct. Rec. 15)
20 is GRANTED.

21 IT IS SO ORDERED. The District Court Executive is directed to
22 enter this Order and an Order of Judgment and forward copies to
23 counsel.

24 DATED this ^{17th} ~~13~~ day of ^{October} ~~September~~, 2005.

25
26
27 
28 MICHAEL W. LEAVITT
United States Magistrate Judge